Supreme Court, U. S.
FILED
MAR 9 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

October Term, 1971
No. 71-1153

AUGUST ROBERT MEYER,
Petitioner

versus

COMMONWEALTH OF KENTUCKY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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INDEX

Opinions in the Court Below 1

Jurisdiction 1– 2

Questions Presented 2– 3

The Constitutional and Statutory Provisions Involved 3– 4

Statement of the Case 4– 7

Reasons For Granting the Writ 8– 31

I. The Kentucky Court of Appeals' Remand of the Instant Case for a Penalty Trial Only Is Violative of the Due Process Clause of the Fourteenth Amendment, The Ex Post Facto Law Prohibition of the Kentucky and United States Constitutions and Kentucky Law. 8–23

A. The Penalty Trial Procedure for Resentencing Petitioner Is Unauthorized by Kentucky Law. 9–15

B. The Penalty Trial Procedure Is a Judicially Created Law Which Violates Both the Ex Post Facto Law Prohibition and the Due Process Clause. 15–16

C. The Penalty Trial Procedure Also Violates That Fundamental Fairness Which the Due Process Clause of the Fourteenth Amendment Requires. 17–22

D. Under Kentucky Law, Petitioner Must Either Be Given a New Trial or a Life Sentence. 23

II. The Admissions and Statements of the Petitioner Were Admitted into Evidence, over His Objection, in Violation of the Due Process Clause of the Fourteenth Amendment, as Interpreted by This Court. 23–27

III. Certain Exhibits and Evidence, Derivative of Illegally Obtained Statements, Were Obtained and Admitted into Evidence in Violation of the Due Process Clause, as Interpreted by This Court. 28

IV. Testimony Concerning the Search of Petitioner's Automobile Was Admitted into Evidence in Violation of the Due Process Clause, as Interpreted by This Court. 29

V. The Petitioner's Motions for Separate Trials Were Overruled, and the Co-defendant's Statements and Admissions Were Admitted into Evidence at the Joint Trial, in Violation of the Due Process Clause, as Interpreted by This Court. 29–31

VI. The Pretrial and Trial Publicity Created an Atmosphere in Which It Was Impossible for Petitioner to Receive a Fair Trial, in Violation of the Due Process Clause as Interpreted by This Court. 31

Conclusion 32

Appendix 1a–20a

Citations

Cases:

Bowie v. Columbia, 378 U.S. 347 (1964) 10
Brumfield v. State, 445 S.W. 2d 732 (1969) 13
Bruton v. United States, 391 U.S. 123 (1968) 30
Calder v. Bull, 3 U.S. (Dall) 386, 390 (1798) 15
Cardinale v. Henderson, 316 F. Supp. 481 (E.D. La. 1970) 13
Chapman v. California, 366 U.S. 18 (1967) 31
Clewis v. Texas, 386 U.S. 707 (1967) 27
Cummings v. State of Missouri, 4 Wall. 277, 325 16
Davis v. North Carolina, 384 U.S. 737 (1966) 27
Dean v. Commonwealth, 166 S.E. 2d 228 (Va. 1969) 25
Ellison v. State, 432 S.W. 2d 955 (Tex. Ct. Crim. App. 1968) 13
Estes v. Texas, 381 U.S. 532 (1965) 31
Fisher v. Cockerill, 5 Mon. 129 16
Frady v. United States, 348 F. 2d 84 (D.C. Cir. 1965) cert. den. 86 S.Ct. 247 14
Grider v. State, 468 S.W. 2d 393 (Tex. Cr. App. 1971) 13
Harrington v. California, 395 U.S. 252 (1969) 31
Killough v. United States, 315 F. 2d 241 (D.C. Cir. 1962) 28
Malley v. South Carolina, 237 U.S. 180 (1915) 15
Marion v. Beto, 434 F. 2d 29 (5th Cir. 1970) 13
McGautha v. California, 28 L.Ed.2d 711 (1971) 9
In re Medley, 134 U.S. 160 (1890) 15
Miranda v. Arizona, 384 U.S. 436 (1966) 24, 25, 26, 27, 29
Myers v. State, Md., 240 A. 2d 288 (1968) 24
People v. Doss, 256 N.E. 2d 653 (Ill. 1970) 13
People v. Fioritto, 441 P. 2d 625 (Cal. 1968) 27

People v. Hudson, 263 N.E. 2d 473 (Ill. 1970) 13
People v. Lee, 254 N.E. 2d 469 (Ill. 1969) 13
People v. Mallett, 259 N.E. 2d 24 (Ill. 1970) 13
People v. Rodney, 286 N.Y.S. 2d 255 (1967) 24
People v. Wilson, 74 Cal. Rptr. 131 (1968) 25
Pointer v. Texas, 380 U.S. 400 (1965) 30
Roberts v. Russell, 392 U.S. 293 (1968) 30
Satterfield v. Virginia, 389 U.S. 425 (1967) 25
Sequra v. Patterson, No. 9908 (10th Cir. 1971) 13
Sheppard v. Maxwell, 384 U.S. 333 (1966) 31
State v. LaFernier, 155 N.W. 2d 93 (Wis. 1967) 25
State v. Laws, 242 A. 2d 333 (1968) 13
State v. Ruth, 170 S.E. 2d 897 (N.C. 1969) 13
State v. Sherrick, 467 P. 2d 908 (1970) 13
State v. Spence, 164 S.E. 2d 593 (N.C. 1968) 13
Thorton v. McGrath, 1 Duv. 349 16
Tuttle v. Commonwealth, 77 S.W. 2d 351 (1934) 10
U.S. v. Hall, 2 Wash. (C.C.) 366 16
United States v. Jackson, 390 U.S. 570 (1968) 11, 12, 15, 21
Ward v. Henderson, 317 F. Supp. 344 (W.D. La. 1970) 13
Winston v. United States, 172 U.S. 303, 309 (1899) 18
Witherspoon v. Illinois, 391 U.S. 510 (1968) 17, 22, 23
Wong Sun v. United States, 371 U.S. 471 (1963) 28

United States Constitution:

Amendment 14 3, 8, 15, 23, 28, 29, 31
Article I, Section 9, Clause 3 3, 8, 15

Kentucky Constitution:

Section 19 4, 8, 15
Section 110 4, 9

Kentucky Revised Statutes:

K.R.S. 21.050 ..... 4, 9
K.R.S. 435.010 ..... 8, 9

Kentucky Rules of Criminal Procedure:

RCr 9.84(1) 4, 8, 9, 10, 11, 12, 23

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No._____

AUGUST ROBERT MEYER,
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vs.

COMMONWEALTH OF KENTUCKY
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioner, August Robert Meyer, asks that a writ of certiorari issue to review the judgment of the Kentucky Court of Appeals made and entered on July 2, 1971.

OPINIONS IN THE COURT BELOW

The opinion of the Kentucky Court of Appeals, reported at 472 S.W. 2d 479, appears in the Appendix hereto. No opinion was rendered by the Trial Court—Jefferson Circuit Court, Criminal Branch, Second Division.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on July 2, 1971. A timely petition for

rehearing was denied on December 3, 1971. On January 10, 1972, the Chief Justice of the Kentucky Court of Appeals ordered that the mandate be withheld and that petitioner be given until March 10, 1972, in which to file this petition for certiorari. It has been so timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

I. Was the Kentucky Court of Appeals' remand of the instant case for a penalty trial only violative of the Due Process clause of the Fourteenth Amendment, the Ex Post Facto Law prohibition of the Kentucky and United States Constitutions, as interpreted by this Court, and Kentucky Law?

A. Is the penalty trial procedure for resentencing petitioner unauthorized by Kentucky law?

B. Is the penalty trial procedure a judicially created law which violates both the Ex Post Facto Law prohibition and the Due Process clause?

C. Does the penalty trial procedure violate that fundamental fairness which the Due Process clause requires?

D. Under Kentucky law, must petitioner be given either a new trial or a life sentence?

II. Were the admissions and statements of the petitioner admitted into evidence, over his objection, in violation of the Due Process clause of the

Fourteenth Amendment, as interpreted by this Court?

III. Were certain exhibits, and evidence, derivative of the illegally obtained statements, admitted into evidence in violation of the Due Process clause, as interpreted by this Court?

IV. Was testimony concerning the search of petitioner's automobile admitted into evidence in violation of the Due Process clause, as interpreted by this Court?

V. Were petitioner's motions for separate trials overruled and were the co-defendant's statements and confessions admitted into evidence at the joint trial in violation of the Due Process clause of the Fourteenth Amendment, as interpreted by this Court?

V. Did the pre-trial and trial publicity create an atmosphere in which it was impossible for petitioner to receive a fair trial, in violation of the Due Process clause, as interpreted by this Court?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment XIV

". . . [N]or shall any State deprive any person of life, liberty, or property, without the due process of law; . . ."

Article I, Section 9, Clause 3

"No . . . ex post facto law shall be passed."

KENTUCKY CONSTITUTION

Section 19

"No ex post facto law . . . shall be enacted."

Section 110

"The Court of Appeals shall have appellate jurisdiction only, which shall be co-extensive with the state, under such restrictions and regulations not repugnant to this Constitution, as may from time to time be prescribed by law."

KENTUCKY REVISED STATUTES

K.R.S. 21.050

"The Court of Appeals may . . . make rules consistent with law for the government of its proceedings and issue necessary writs to give it general control of inferior jurisdictions."

KENTUCKY RULES OF CRIMINAL PROCEDURE

RCr. 9.84(1)

"When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty . . ."

STATEMENT OF THE CASE

Ralph Wright's body was found in Shelby County, Kentucky, on November 6, 1966. Jefferson County detectives had gone to petitioner's home on November 5, 1966, to interview him because, from their investigation, they felt that he was the last known person to see Wright. On November 12, 1966, petitioner

received a threatening anonymous telephone call, wherein the caller threatened to tell the police that petitioner had killed Wright if petitioner refused to pay the caller a certain sum of money. After calling the County Police, petitioner was advised to and did drive to County Police Headquarters, arriving about 9:20 a.m. He was questioned extensively the entire day without being fed any food. Not once was petitioner advised of his rights during custodial interrogation. About 4:30 p.m., he was asked and agreed to take a lie detector test in Frankfort, Kentucky, 50 miles away. After being advised by a Kentucky State Police official that he should sign a waiver of his rights before taking the test, petitioner refused to take the test and requested an attorney. His request was not granted. Petitioner was then taken to another building where his automobile was examined. He was told that blood had been found on the front seat of his car. Further questioning by police produced an oral statement that petitioner and Julius R. Mathis had killed Wright. Petitioner was brought back to Louisville just before midnight, almost sixteen hours after he had arrived at County Police Headquarters. Shortly, before, he had been taken to his place of employment to obtain some eye medicine. A police officer permitted petitioner to call his wife to employ an attorney, who requested County Police not to take any statements from petitioner and who advised petitioner not to make a statement.

As a result of petitioner's oral statement, the police

immediately began a search for Julius R. Mathis, who surrendered to police in Birmingham, Alabama, on November 14, 1966. He signed papers waving extradition to Kentucky. On his way back to Kentucky in the officer's automobile, Mathis was questioned and orally admitted the crime, but signed no statement.

Petitioner and Julius Mathis were jointly indicted for willful murder (T.R. 2).[1] Petitioner filed a Motion several months before trial in which he requested the Court to grant him a separate trial. This Motion was overruled by the Court several times before and during the trial (T.R. 19, 20, 38, 39) (T.E. 598, 599).

A pretrial Motion for change of venue was filed by petitioner (T.R. 17). The necessary Affidavits accompanied the motion (T.R. 21-24). A hearing was had on this motion and is entitled "Transcript of Proceeding and Testimony April 27, 1967." Three witnesses from the news media testified concerning news coverage of the base prior to trial. Copies of newspaper articles were filed with the motion (T.R. 36 & 36A). After the trial, petitioner, in his motion and grounds for a new trial, alleged that publicity during the trial denied him a fair trial. The jury was *not* admonished not to look at television or listen to the radio (T.E. 389). A volume of evidence entitled, "Hearing on Motion for New Trial; July 25, 1967" contains the proof of media coverage during the trial.

At the trial, which commenced May 12, 1967, and

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[1]References to the Transcript of Record will be designated as T.R. page ___. References to the Transcript of Evidence will be designated as T.E., page ___.

continued through May 15, 1967, petitioner objected to the introduction of evidence by several police officers regarding oral admissions made to them by Mathis. These oral admissions were not made in the presence of petitioner and were very incriminating to him. Petitioner's objections were overruled (T.E. 503, 525, 642, 647, 690, 691). Petitioner made a Motion to strike the testimony of each of the police officers involved, but in each instance was overruled (T.E. 639, 683, 711, 1020, 1021). This issue was properly raised prior to and during trial, and in the Motion and Grounds for New Trial (T.R. 46, 47, 51, 52, 53).

The jury returned a verdict finding both defendants guilty, fixing Mathis's punishment at life in the penitentiary and petitioner's punishment at death. Petitioner's Motion for New Trial was ultimately overruled, and the trial court pronounced the judgment of death in accordance with the verdict of the jury. Petitioner filed an appeal to the Court of Appeals of Kentucky. On July 2, 1971, that Court affirmed petitioner's conviction, and reversed and remanded the case solely on the issue of punishment, because of a *Witherspoon* violation. Petitioner's petition for rehearing was denied on December 3, 1971. The Court of Appeals' mandate is being withheld pending the filing of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE KENTUCKY COURT OF APPEALS' REMAND OF THE INSTANT CASE FOR A PENALTY TRIAL ONLY IS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, THE EX POST FACTO LAW PROHIBITION OF THE KENTUCKY AND UNITED STATES CONSTITUTIONS AND KENTUCKY LAW.

SUMMARY OF THIS REASON

Life in the penitentiary or death is the alternative mandatory punishment for murder under Kentucky Revised Statutes 435.010. No statutory provision authorizes a separate penalty trial. The Kentucky Court of Appeals' own Rule of Criminal Procedure 9.84(1) explicitly envisions only a unitary trial proceeding. There is no basis in Kentucky law for the bifiurcated trial procedure the Commonwealth now seeks to institute to pass sentence. The penalty trial procedure is a judicially created ex post facto law forbidden by the Constitutions of the United States and the Commonwealth of Kentucky. Because of its ex post facto nature, the separate penalty trial procedure also violates the Due Process clause of the Fourteenth Amendment. The penalty trial procedure also violates that fundamental fairness the Due Process clause of the United States Constitution requires because (1) certain crucial types of evidence relevant to the sentence determining process are inadmissible at a penalty trial; and (2) the procedure is unprecedented in Kentucky law and petitioner therefore is unable to adequately prepare for it. Under Kentucky law, the

courts have only two sentencing alternatives in the present context: (a) to reduce petitioner's sentence to a life term, or (b) to grant petitioner a new trial.

A. The Penalty Trial Procedure For Resentencing Petitioner Is Unauthorized By Kentucky Law.

Life in the penitentiary or death is the alternative mandatory punishment for murder under Kentucky Revised Statutes 435.010. The Kentucky Court of Appeals has promulgated the Rules of Criminal Procedure, pursuant to House Bill No. 74 (1962c 234, Effective 1-1-63), Section 110 of the Kentucky Constitution and Kentucky Revised Statutes 21.050. RCr 9.84(1) provides that:

> "When the jury returns a verdict of guilty it shall fix the degree of the offense *and* the penalty . . ." (Emphasis addd)

This rule delegates to the jury the power to determine the guilt of the defendant and, if guilty, the penalty to be imposed upon the defendant. This Court's recent decision of *McGautha* v. *California*, 28 L.Ed. 2d 711 (1971), approves, as constitutional, the single verdict procedure for determining guilt and punishment.

The Kentucky Court's mandate for procedure upon remand of *Meyer* v. *Commonwealth* is violative of RCr 9.84, supra, because it seeks to bifurcate a procedure which, in Kentucky, is a unitary and indivisible provision. The Court of Appeals is without the power

to set aside a code provision by the adoption of an inconsistent rule. In *Tuttle* v. *Commonwealth,* 77 S.W. 2d 351 (1934), that Court held that a statute permitting it to adopt rules "consistent with law" did not empower it to set aside Criminal Code of Practice (the forerunner of the Rules of Criminal Procedure) provisions by the adoption of an inconsistent rule. In the case at bar, this principle applies as well. Under the provisions of RCr 9.84(1), the same jury must decide both the issues of guilt and punishment. No procedure is provided by these rules for the Circuit Court to bifurcate the guilt-punishment procedure, e.g. by the Court's instruction to the jury to find the defendant guilty and then for the jury to set the punishment.

It is crystal clear that the authors of the Rules of Criminal Procedure, i.e., the Judges themselves of the Kentucky Court of Appeals, intended only to authorize the jury *which passes on guilt* to pass on the question of penalty. Nowhere does the statute or rule refer to the possibility of having a second and totally different jury "qualify" the verdict returned by another. In *Bowie* v. *Columbia,* 378 U.S. 347 (1964), this Court said that:

> "The case must be a strong one indeed which would justify a court in departing from the plain meaning of words . . . in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to do so."

The language of RCr 9.84(1) should not and, indeed, cannot be read to authorize any separate penalty trial proceeding in Kentucky.

Support for this position may be found in *United States* v. *Jackson*, 390 U.S. 570 (1968). In that case, this Court was asked to find that statutory language in the Federal Kidnaping Act, 18 U.S.C. § 1201(a)[1] authorized the convening of a special jury to pass upon the question of punishment after a defendant had pled guilty to a capital offense. There was no history of such juries having been convened in such circumstances under the statute. The Government reasoned that since the Act did not explicitly state that the jury recommending capital punishment must be the jury impaneled to determine guilt as well, the convening of a special jury to determine punishment was authorized where a defendant pled guilty to the offense. This Court found that to be an unreasonable reading of the language of the Act. It said:

> ". . . [T]he statute does not say 'a jury.' It says '*the* jury.' At least when the defendant demands trail by jury on the issue of guilt, the Government concedes that 'the verdict of the jury' means what those words naturally suggest: the

[1]That section provides:

> "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and *if the verdict of the jury* shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (Emphasis added)

[2]Petitioner presumes in this case that the Commonwealth would concede as much.

> general verdict of conviction or acquittal returned by the jury that passes upon guilt or innocence.[2] Thus, when such a jury has been convened, the statutory reference is to that jury alone, not to a jury impaneled after conviction for the limited purpose of determining punishment. Yet the Government argues that, when the issue of guilt has been tried to a judge or has been eliminated altogether by a plea of guilty, 'the verdict of the jury' at once assumes a completely new meaning. In such a case, it is said, 'the verdict of the jury' means the recommendation of a jury convened for the sole purpose of deciding whether the accused should live or die."

Obviously, were this Court to read RCr 9.84(1) to authorize the convening of a "special" jury, it would have to resort to reasoning similar to that above, of which this Court continuing said,

> "It is one thing to fill a minor gap in a statute —to extrapolate from its general design details that were inadvertently omitted. It is quite another thing to create from whole cloth a complex and completely novel procedure and to thrust it upon unwilling defendants . . .
>
> * * *
>
> "That we decline to do."

If this Court so declined in the *Jackson* case, it should do likewise here.

It is useful to turn attention to what the courts of other states faced with issues similar to that presented here have done. A sampling follows: In

Cardinale v. *Henderson*, 316 F. Supp. 481 (E.D. La. 1970), the court found that the effect of a breach of Witherspoon is to set aside the death penalty and to impose in its place, the other sentence which the jury could have imposed following a finding of guilt, *i.e.*, life imprisonment. The court did not see authorization for a separate penalty trial proceeding under its mandatory scheme. In *Ellison* v. *State*, 432 S.W. 2d 955 (Tex. Ct. Crim. App. 1968), the jury which first assessed appellant's guilt without considering the question of sentencing was then reconvened to pass on the question of punishment. After a separate hearing, death was assessed. On appeal, the Court of Criminal Appeals found that the trial court was without authority to direct a new trial before a different jury on the issue of punishment only. It found that guilt determining and penalty deciding power were vested only in *one jury* panel under the statutory framework. Apposite here too are *State* v. *Spence*, 164 S.E. 2d 593 (N.C. 1968); *State* v. *Ruth*, 170 S.E. 2d 897 (N.C. 1969); *Segura* v. *Patterson*, No. 9998 (10th Cir. 1971); *Ward* v. *Henderson*, 317 F. Supp. 344 (W.D. La. 1970); *Marion* v. *Beto*, 434 F. 2d 29 (5th Cir. 1970); *Brumfield* v. *State*, 445 S.W. 2d 732 (1969); *Grider* v. *State*, 468 S.W. 2d 393 (Tex. Cr. App. 1971); *People* v. *Mallett*, 259 N.E. 2d 24 (Ill. 1970); *People* v. *Lee*, 254 N.E. 2d 469 (Ill. 1969); *People* v. *Doss*, 256 N.E. 2d 653 (Ill. 1970); *People* v. *Hudson*, 263 N.E. 2d 473 (Ill. 1970); *State* v. *Sherrick*, 467 P. 2d 908 (1970); *State* v. *Laws*, 242 A. 2d 333 (1968).

Special attention, too, should be paid to the words of Chief Justice Burger, while a judge in the District of Columbia Circuit Court of Appeals, in *Frady* v. *United States,* 348 F. 2d 84 (D.C. Cir. 1965), *cert. den.* 86 S.Ct. 247. There the District of Columbia Circuit *en banc* was considering, among other things, whether a bifurcated trial procedure was authorized under the terms of 22 D.C. Code § 2404, which provided for the imposition of a mandatory sentence of death in a capital case unless the jury in its verdict returned recommendation of life. At least one judge, McGowan, felt that a bifurcated trial proceeding could be implied from the language of the statute. Judge Burger was stinging in his criticism of that approach. Said he:

> "The argument . . . is . . . that the court may fashion such a scheme out of 'neutral' congressional will or out of a 'silence' we envisage from failure by Congress expressly to specify that a split-verdict procedure is *not* to be judicially instituted. I cannot subscribe to this argument because the terms of the statute . . . demonstrate that the traditional single trial was intended with the jury having a dual function—on guilt and on penalty." *Id.* at 114.

Refusing to *stretch* the language of the statute, the Judge continued in language which with few changes might well be applied to the instant facts:

> "Congress must, then, be supposed to have known what a two-trial statute was and how it

functioned generally. With this knowledge it refused to create one. Nor can it be supposed that the present statute was meant to leave in judicial limbo the question of single-versus split verdict procedure. *Ibid.*

"Even on the assumption that the failure of . . . [the Kentucky Legislature] to . . . [envision the present circumstances] was wholly inadvertent, it would hardly be the province of the courts to fashion a remedy." *U. S.* v. *Jackson*, *supra* at 579.

B. The Penalty Trial Procedure Is A Judicially Created Law Which Violates Both The Ex Post Facto Law Prohibition And The Due Process Clause.

Section 19 of the Kentucky Constitution and Article I, Section 9, Clause 3 of the United States Constitution contain prohibitions against ex post facto laws. The federal ex post facto law prohibition has been construed by this Court to forbid:

". . . every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed [and] . . . every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of commission of the offenses in order to convict the offender." *Calder* v. *Bull*, 3 U.S. (Dall.) 386, 390 (1798).

See also, *In re Medley*, 134 U.S. 160 (1890); *Malley* v. *South Carolina*, 237 U.S. 180 (1915). The courts of

Kentucky have adopted this construction. *Fisher* v. *Cockerill*, 5 Mon. 129; *Thorton* v. *McGrath*, 1 Duv. 349.

> "An *ex post facto* law is one, . . . *in short, which in relation to the offense and its consequences, alters the situation of a party to his disadvantage.*" *U.S.* v. *Hall*, 2 Wash. (C.C.) 366.

Because it has such a broad purpose in our Constitutional framework, this Court has said that the ex post facto clause should be given a liberal construction by the courts.

> "The Constitution deals with substance, not shaddows. It [the ex post facto clause's] inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguished. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." *Cummings* v. *State of Missouri*, 4 Wall. 277, 325.

The fact therefore that a particular change in a law is procedural rather than substantive is of no particular import. The fact that a change in law affects the procedure whereby punishment is assessed or the likelihood that a particularly more severe punishment will be inflicted in a case, does not remove the change from the purview of the clause's prohibition.

C. The Penalty Trial Procedure Also Violates That Fundamental Fairness Which The Due Process Clause Of The Fourteenth Amendment Requires.

At the outset, it bears emphasizing that this is a capital case. In the balance is the life of a man. Therefore, any change, no matter how seemingly minor, is potentially of moment as its possible effect may be, if it shifts the scale but minutely, to nevertheless shift that scale toward death.

The scrupulous concern of this Court in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), for the rights of capital defendants exemplifies the standard of care and due process the Kentucky Court should have employed in appraising petitioner's claims. ". . . [T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death." *Id.* at 522, n. 7. In *Witherspoon* this Court stated that "Unless a venireman states *unambiguously* that he would *automatically* vote against the imposition of capital punishment no matter what the trial might reveal, it simply *cannot be assumed* that that is his position." *Id.* at 515 n. 9. (emphasis added). Here the Kentucky Court should not have *assumed* that this unprecedented penalty trial procedure would not prejudice the petitioner. It makes the promise of *Witherspoon* empty indeed if this Court's concern for painstaking observation of a capital defendant's rights can be frustrated so easily on remand by a circumscribed, poorly defined penalty trial procedure. At a minimum,

defendants deserve the purest, most well established type of proceedings available in the circumstances—new trials or imposition of life sentences. What then is the injury of which petitioner complains?

The penalty trial procedure which the state now seeks to implement prejudices the petitioner in a number of particulars. Perhaps the best way to categorize these detriments is to view them in terms of (1) injury and prejudice inhering in the nature of a separate penalty trial proceeding, and (2) injury arising out of and related to *uncetainty* inhering in this new process.

The same jury which passes upon guilt is also the jury to pass on punishment in a unitary trial. (This was the case as regards the instant petitioner.) That jury therefore has the benefit of hearing everything that is known as to the question of defendant's guilt before it must pass on punishment. *Winston* v. *United States*, 172 U.S. 303, 309 (1899). We believe that it is not unreasonable to assume, indeed, it is an irrefutably correct assumption, that a jury sitting on the question of guilt takes into consideration all or part of that evidence in deciding punishment.

The jury sitting on the question of guilt is instructed that it must find defendant guilty of the crime beyond a reasonable doubt. It need not find him guilty to an absolute certainty to convict. Petitioner contends that, within that narrow range from reasonable doubt to absolute certainty that defendant committed the crime, lies evidence as to guilt or innocence

which may not be sufficient to preclude conviction, but may be sufficient to influence a juror to fix the penalty at less than the maximum prescribed, e.g., perhaps a gnawing intuition that there may be more to the case as to defendant's guilt or innocence than has been produced. It is a delicate, but nonetheless real, category of factors which are influential in the punishment determination; it is a category of factors derived from, and bound up with, evidence as to guilt adduced upon the trial.

In a penalty trial this evidence is vitiated. The jury is told that a defendant is guilty of the crime. The jury is told that it is only to pass on the question of punishment. Presumably an abbreviated account or replay of the original trial is brought before the jury. Defense counsel presumably is precluded from introducing evidence going to the question of a defendant's innocence unless he can show such evidence relevant to mitigation—a very fine line indeed. Defense counsel is not allowed to argue innocence to this new jury, with the result being that the prosecution is allowed to marshal and present to the jury all of the aggravating circumstances that exist, while the defense is gagged.

Nor is there any way within a penalty trial proceeding in which this injury may be mitigated. Announcing to any penalty jury (which has not also determined guilt) that defendant is guilty as charged, no matter what the circumstances, and no matter what the defense may do subsequently, is so highly preju-

dicial as to be fundamentally unfair. This is so for this reason. When a jury is first empanelled in a unitary trial context, that jury comes to the case with *no* knowledge of the defendant, with *no* judgment as to his character, and must *presume* the defendant's *innocence* until he is proven guilty. Therefore, the jury begins the judgment-making process untainted and waits for the prosecution to dispel the presumption of innocence. It first sees the defendant in a favorable light as an accused, rather than as a convicted man. In the penalty trial procedure, by way of contrast, the jury is advised at the outset that the defendant is *guilty* of a capital offense. Its first view of defendant is as a criminal, a person who has committed a terrible crime. No longer is defendant clothed with the presumption of innocence and its carry-over effect of causing the panel to be neutral in its weighing of the evidence and factors of mitigation. Rather, the jury may come to the proceeding with a taint based on its knowledge of the conviction, which taint may *predispose* the jury to view defendant with suspicion if not outright condemnation. The only way in which mitigation evidence and evidence in the range from reasonable doubt to absolute certainty can be properly put before a jury is in the context of an entire new trial.

But more injury than that adverted to above adheres to the detriment of a defendant pursuant to the penalty trial procedure. There is also, as was said at the beginning of this section, injury arising out

of and related to uncertainty inhering in the new procedure itself. To delineate this type of uncertainty, the series of questions set forth in *United States* v. *Jackson, supra,* as an example of the problems judicial enactment of a penalty trial procedure must create, are considered:

> "If a special jury were convened to recommend a sentence, how would that penalty hearing proceed? What would each side be required to show? What standard of proof would govern? To what extent would conventional rules of evidence be abrogated? What privileges would the accused enjoy?"

Petitioner knows the answers to none of these questions. Consider the question regarding evidentiary rules.

Is this to be a wholly standardless proceeding or is there any burden defendant must sustain to entitle him to a life sentence? Is there such a thing as reversible error?

The questions could go on and on. They illustrate the point sharply. Defense counsel is being asked to go into an unprecedented proceeding blind and therefore unprepared. Under the unitary trial system this would not have been the case. There, there was a body of experience upon which counsel could draw in preparing for and anticipating trial. Not so here. No wonder this Court declined to read a convening of a special jury authority into the statute in *United States* v. *Jackson, supra*:

> "If the relative novelty of penalty proceedings has thus *impaired effective representation* in jurisdictions where the contours of such proceedings have been fixed by statute, it seems clear that the difficulties for the defense would be *even more formidable under that amorphous case-by-case system that the Government asks us to legitimitize today. United States* v. *Jackson, supra* at 146, n. 19. [emphasis added]"

This Court has thus recognized that a penalty trial procedure not planned and set forth with explicit directives as to content can severely prejudice a defendant and virtually render nugatory any efforts of counsel in his behalf. We contend that, under the instant circumstances, to force an unwilling defendant to place the question of whether he shall live or die before a jury without any guidelines as to what the nature of the proceeding will be violates fundamental fairness, effectively deprives them of the right to counsel under the Sixth Amendment, and violates the prohibition against ex post facto laws ". . . [A] State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Witherspoon* v. *Illinois, supra* at 521.

We submit that to commit the question of whether defendant shall live or die to a penalty trial tribunal would be to do precisely that.

D. Under Kentucky Law, Petitioner Must Either Be Given A New Trial Or A Life Sentence.

It was explained in Part A, *supra,* that petitioners are and should be entitled to new trials in the instant circumstances (1) because the language of RCr 9.84(1) requires it and (2) because that is the only way, save one, in which the prejudice inherent in the separate penalty trial procedure may be dissipated. It remains only to delineate the other acceptable and lawful alternative to the granting of new trials in the present context, *i.e.,* imposition by the Court of a life sentence.

Since the *Witherspoon* reversal is as to punishment, the situation is most closely akin to that under which a defendant has pled guilty, and the court may, without empaneling any jury, impose a life sentence. This is the most obvious way of disposing of the problems a *Witherspoon* reversal raises.

II.

THE ADMISSIONS AND STATEMENTS OF THE PETITIONER WERE ADMITTED INTO EVIDENCE, OVER HIS OBJECTION, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AS INTERPRETED BY THIS COURT.

The Fourteenth Amendment to the U. S. Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law . . ."

In reliance upon what it conceived to be the principles underlying "due process of law," the Kentucky Court of Appeals has here held that "due process of law" includes something less than the principles enumerated by this Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In its opinion of July 2, 1971, the Kentucky Court stated:

> "Nowhere in any constitution, either Federal or state, is a requirement that officers charged with the investigation of a crime must enlighten the suspect of his right against self-incrimination. But *Miranda* does just that, and until it is overruled we must try to live with it."

Besides the Kentucky Court's disrespect for this Court, it stated that there was no custodial interrogation here, and accordingly no warnings were required. The custody requirement of *Miranda* does not depend on the subjective intent of the law enforcement officer-interrogator, but upon whether the suspect is physically deprived of his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation. This view has been adopted in *People* v. *Rodney*, 286 N.Y.S. 2d 225 (1967) and *Myers* v. *State*, Md., 240 A. 2d 288 (1968). Upon an examination of the record, it can be seen that not only did petitioner think he was in custody (T.E. 941), but also that the Jefferson County Police regarded him as a prime suspect (T.E. 893).

The trial court expressed the view that, because

petitioner was not formally placed under arrest, he was not in custody and therefore *Miranda* warnings were not required (T.E. 1039). This view is not consistent either with *Miranda* or *Satterfield* v. *Virginia*, 389 U.S. 425 (1967), where this Court summarily reversed a Virginia court ruling that the failure to warn an accused murdered of his Fifth and Sixth Amendment rights did not bar the admission at his trial of statements he had made to a sheriff during an interview that *the accused had initiated*. No formal arrest is necessary before the *Miranda* warnings must be given and before there is custodial interrogation. *Dean* v. *Commonwealth*, 166 S.E. 2d 228 (Va. 1969); *People* v. *Wilson*, 74 Cal. Rptr. 131 (1968); *State* v. *LaFernier*, 155 N.W. 2d 93 (Wis. 1967).

The petitioner contends that he was "in custody" upon his arrival at police headquarters at 9:30 A.M., November 12, 1966. The police knew that he was the last person to see Ralph Wright alive and that he had reportedly carried a gun in the glove compartment of his automobile. If the petitioner was not in custody, why then did Detective Barber ask (1) that he sign a waiver for the search of his automobile (2) that he take a lie detector test (3) that he sign a waiver for the taking of fingerprints, and (4) ask him if he killed Ralph Wright? All of this evidence shows that the investigation had begun to focus on the accused. Consequently he should have been advised of his constitutional rights under *Miranda* v. *Arizona*, *supra*, no later than the moment before these questions

were asked and it is uncontradicted that he was not so advised.

At the very latest, custodial interrogation began when the petitioner's automobile was being searched at the County Garage. At that time a very detailed search was conducted by using a vacuum cleaner and the bright light. The search revealed reddish splotches and speckles thought by the police to be blood. The petitioner was questioned about these substances and was *again* asked to take a lie detector test. At no time was the petitioner advised of his *Miranda* rights, although it is obvious that all of the officers must have believed him to be guilty of killing Ralph Wright.

If the petitioner was not suspected, why so many investigating officers? Why was it necessary for all of the police officers in charge of the case to go to Frankfort that night? Why such a detailed search of the automobile? Why the absolute necessity of administering a lie detector test at 7:00 P.M. that night 50 miles away in Frankfort? Why the necessity in having the petitioner's automobile checked for blood stains at 9:00 P.M. after he expressed his wishes for an attorney? The only possible answer is that these officers believed the defendant to be guilty. In none of the cases cited above did the investigating officers have as much reason to suspect guilt than did the investigating officers in the case at bar.

Not only did the officers fail to advise Meyer of his rights during custodial interrogation, but also *Miranda* was violated in another respect: Prior to

departing for Frankfort, the petitioner asked to consult with an attorney, the officers again asked if he would be willing to take the lie detector test. In *Miranda* v. *Arizona,* this Court held that if the defendant *"indicates at any manner and at any state of the process that he wishes to consult with an attorney before speaking there can be no questioning".* Not only did the petitioner ask to see an attorney before leaving Louisville, but also he made this request after he was advised of his rights at the State Building in Frankfort. At this point the interview should have been terminated. Accord, *People* v. *Fioritto,* 441 P. 2d 625 (Cal. 1968).

The circumstances surrounding the petitioner's confession bear out his contention that the confession could not have been voluntary. In this respect, this Court held in *Davis* v. *North Carolina,* 384 U.S. 737 (1966), that the question of voluntariness must be determined by a consideration of the "totality of circumstances." In *Clewis* v. *Texas,* 386 U.S. 707 (1967), the circumstances which this Court regarded as significant were the length of time that the defendant had gone without food and rest, and long subjection to police custody with little or no contact with anyone other than the police. All of these evils which *Miranda* was designed to prevent existed in this case.

III.

CERTAIN EXHIBITS AND EVIDENCE, DERIVATIVE OF ILLEGALLY OBTAINED STATEMENTS, WERE OBTAINED AND ADMITTED INTO EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE, AS INTERPRETED BY THIS COURT.

Evidence derived from an illegal source is not admissible and, before any evidence following an involuntary confession can be admitted, it must be shown that the evidence was obtained from a source "sufficiently distinguishable to be purged of the primary taint". *Wong Sun* v. *United States*, 371 U.S. 471 (1963). All of the information obtained as a result of petitioner's "cooperation" with the police was derivative from the illegal confession. Accordingly, all items relative to the details of the crime were merely a continuation of the petitioner's involuntary confession at the police barracks. In *Killough* v. *United States*, 315 F. 2d 241 (D.C. Cir. 1962), the Court held that an illegally obtained confession creates a rebuttable presumption that all "subsequent confessions are tainted by the continuing influence of the first illegality." It is for this reason that the trial court erred in admitting any incriminating statements or evidence against the petitioner after his involuntary confession.

IV

TESTIMONY CONCERNING THE SEARCH OF PETITIONER'S AUTOMOBILE WAS ADMITTED INTO EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE, AS INTERPRETED BY THIS COURT.

The evidence obtained as a result of the search of petitioner's automobile is inadmissible because (1) it was obtained at a time when the petitioner should have been, but was not, advised of his constitutional rights under *Miranda* v. *Arizona, supra,* and (2) the consent to search or waiveer for search signed by petitioner was not a valid waiver. The prosecution must prove by clear and convincing evidence that there has been an *intelligent* waiver of constitutional rights. In the absence of a warning to the petitioner that he could refuse a warrantless search, it is unnecessary to determine whether his consent to the search was voluntary. Because petitioner was not advised that he could refuse to permit his automobile to be searched, the waiver that he signed was invalid. Consequently, the evidence obtained thereby must be excluded.

V.

THE PETITIONER'S MOTIONS FOR SEPARATE TRIALS WERE OVERRULED, AND THE CO-DEFENDANT'S STATEMENTS AND ADMISSIONS WERE ADMITTED INTO EVIDENCE AT THE JOINT TRIAL, IN VIOLATION OF THE DUE PROCESS CLAUSE, AS INTERPRETED BY THIS COURT.

At the joint trial of petitioner and Mathis, several police officers testified concerning the oral admissions

made to them by Mathis. Timely objections were entered by petitioner both at the trial and in the Motion and Grounds for New Trial (T.R. 46, 47, 51, 52, 53). This factual situation is identical to that in *Bruton* v. *United States,* 391 U.S. 123 (1968), made retroactive by *Roberts* v. *Russell,* 392 U.S. 293 (1968). As in *Bruton,* admonitions were requested and given by the trial court to the effect that Mathis' admissions to the officers should not be considered by the jury against petitioner. This Court, in *Bruton,* found that petitioner's rights were violated, namely, his right of cross-examination secured by the Confrontation Clause of the Sixth Amendment and applicable to state trials by *Pointer* v. *Texas,* 380 U.S. 400 (1965). This Court found a "substantial risk that the jury, despite instructions to the contrary," might look to the incriminating extrajudicial statements in determining petitioner's guilt, since neither defendant there as here took the witness stand.

> "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. * * * Despite the concededly clear instructions to the jury to disregard [the] inadmissible hearsay evidence inculpating petitioner, * * * the effect is the same as if there had been no instruction at all."

By no stretch of the imagination can it be concluded in this case that a belief beyond a reasonable doubt could be declared that the error complained

of was harmless error, as this Court announced in *Chapman* v. *California,* 366 U.S. 18 (1967) and *Harrington* v. *California,* 395 U.S. 252 (1969).

VI.

THE PRETRIAL AND TRIAL PUBLICITY CREATED AN ATMOSPHERE IN WHICH IT WAS IMPOSSIBLE FOR PETITIONER TO RECEIVE A FAIR TRIAL, IN VIOLATION OF THE DUE PROCESS CLAUSE AS INTERPRETED BY THIS COURT.

This Court's decisions in *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966), and *Estes* v. *Texas,* 381 U.S. 532 (1965) apply to this petitioner. Two volumes: "Transcript of Proceeding and Testimony April 27, 1967," and "Hearing on Motion for New Trial July 25, 1967," contain the proof of the media coverage before and during petitioner's trial. Examination of the prejudicial publicity therein is conclusive that petitioner was denied a fair trial, but if there be any doubt of its effect on the jury, this Court need only look to the trial court's admonishment to the jury and the sheriffs (T.E. 389):

> "By the Court: You will permit no newspapers to reach the hands of the jurors while they are under your charge. I don't know how we can control the television, radio, communications in the rooms, but no newspapers."

Included in the two volumes of evidence previously cited are both radio and television transcripts, as well as newspaper articles.

CONCLUSION

Because petitioner was denied due process of law as a result of the trial court's errors, and because the Kentucky Court of Appeals' directions on remand for a penalty trial only violate due process and the ex post facto law prohibition, and are unauthorized by Kentucky law, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK E. HADDAD, JR.
Counsel for Petitioner

APPENDIX

COURT OF APPEALS OF KENTUCKY

Rendered: July 2, 1971
Rehearings Denied December 3, 1971

August Robert Meyer - - - - - Appellant

v.

Commonwealth of Kentucky - - Appellee

and

Commonwealth of Kentucky - - Appellee

vs.

Julius Mathis - - - - - - Appellant

(Consolidated Appeals)

Appeals from Jefferson Circuit Court
Criminal Branch, Second Division
Honorable J. Miles Pound, Judge

OPINION OF THE COURT BY JUDGE EDWARD P. HILL, JR.

Reversing as to Appellant August Robert Meyer; Affirming as to Appellant Julius Mathis

The appellants, August Robert Meyer and Julius Mathis, on their separate but consolidated appeals seek to reverse their convictions for the wilful murder of Ralph Ronald Wright. Appellant Meyer was given the death penalty, while appellant Mathis received a life sentence.

We first discuss Meyer's appeal. He presents ten questions in his table of contents and authorities. We shall identify them as we go along.

First Meyer says his conviction cannot stand because the trial court committed prejudicial error by excluding prospective jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

Here is what occurred. The trial judge asked the panel of jurors the following question: "Do any of you sincerely hold any scruples against inflicting the death penalty? If so, raise your hand." Whereupon a number of hands were raised. The judge then said: "Give your name and your number to the clerk, and then you may go." Fifty-nine of the original panel were thus summarily excused.

With the exclusion of so many of the prospective jurors just mentioned, it was determined by the trial judge that additional jurors were needed, and they were obtained from the courtrooms of two other judges of the Jefferson Circuit Court. However, before any of the additional jurors were dispatched from those courtrooms, those who were "opposed" to capital punishment and who "did not believe in capital punishment" were excused. Counsel for appellant Meyer objected to this manner of exclusion, but his objection was overruled.

Meyer contends that under the rule announced by the Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 776, 88 S.Ct. 1770 (1968), his conviction cannot stand. The appellee, the Commonwealth of Kentucky, through its legally constituted representative, the Attorney General, has frankly conceded error in this respect and admits the conviction cannot stand, but disagrees with the appellant on the proper procedure in the trial court on remand.

Meyer urges this court to reverse and remand this case and to hold that the appellant Meyer's conviction be upheld and the sentence of death be held invalid with directions to "resentence the appellant Meyer to life imprisonment." The appellee argues that on remand another jury, properly selected, be authorized under the evidence to fix his punishment.

We turn to Witherspoon and other Federal court cases for guidance in this situation.

The Supreme Court said in Witherspoon, supra, at page 523, footnote 21:

> "• • • Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this case or any other case."

In a similar case, Alexander v. State, 225 Ga. 358, 168 S.E.2d 315 (1965), the Supreme Court of Georgia in an opinion interpreting Witherspoon had this to say at page 317:

> "• • • [T]he death sentence in this case must be reversed with directions that the trial court impanel a jury selected as in a capital case for the submission to it of the question of the punishment to be imposed upon the defendant for the crime of murder."

We interpret In Re Hill, 80 Cal. Rptr. 537, 458 P.2d 449, 465 (1969), as announcing a similar interpretation of Witherspoon wherein it reversed "for a new penalty trial."

The United States Court of Appeals, Fifth Circuit, in Williams v. Dutton, 400 F.2d 797 (1968), announced

it interpreted Witherspoon as did Georgia and California.

We find nothing in the Constitution of Kentucky to inhibit this court from interpreting *Witherspoon* as did the Georgia and California courts and the Fifth Federal Circuit Court. Neither do we think that the fact the jury was composed of only persons who believe in the death penalty rendered it incapable or prejudiced to determine the guilt or innocence of a person charged with a capital offense. Therefore, we conclude that on remand a jury be selected as in capital cases, not in violation of the system condemned in Witherspoon, and instructed to find appellant Meyer guilty of wilful murder and to fix his penalty at life or death within the discretion of the jury. Of course, the Commonwealth may waive its right to demand the death penalty. The defendant may not waive jury trial where he enters a plea of not guilty. See McPerkin v. Commonwealth, 236 Ky. 528, 33 S.W. 2d 622, and Tackett v. Commonwealth, 320 S.W.2d 299 (1959). However, where he enters a plea of guilty, he may consent to the fixing of his punishment by the court and waive the assessment of punishment by a jury. (Not so in death cases RCr 9.84(2).)

In Fryrear v. Commonwealth, this day decided, we are giving the same interpretation of Witherspoon as herein given.

Meyer's second argument is that the admission of his confession violated his constitutional rights. He relies upon Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

Before getting into this question, we shall undertake to give some of the facts of this case along with the circumstances surrounding the giving of the confession.

Appellants Meyer and Mathis are accused in the shooting death of Ralph Roland Wright. Wright was last seen on the evening of November 1, 1966, as he and a friend were leaving the Plantation Swim Club where Wright served as club manager and swimming coach.

The Jefferson County Police were alerted when Wright's family reported him missing. An investigation was commenced to determine the whereabouts of Wright. When the police interviewed the friend who had left the club with Wright, they learned the two men had walked together to the club parking lot and had separated at that point to go toward their respective cars. The only other information the friend was able to furnish was the description of a car he remembered seeing in the parking lot that night. The police were then able to ascertain the car's description matched that of a car owned by the appellant Meyer, who happened to be a member of the swim club. The police then interviewed Meyer and were told by him that he had talked to Wright in the parking lot but that that was the last time he had seen him, and he assumed Wright had left about the same time since he had observed Wright's headlights behind him as he was leaving the parking area.

On November 6, 1966, Wright's body was found beside a rural road in neighboring Shelby County. An autopsy revealed the cause of death could be attributed to the presence of two gunshot wounds in the chest.

The discovery of Wright's body prompted the Jefferson County homicide detectives to enter the investtigation. On November 7, 1966, Detective Barber was assigned to the case, and having been informed that Meyer was the last-known person to see Wright alive,

he went to the paint store where Meyer was employed to interview him. However, due to a number of customers being present, Detective Barber suggested they go down to police headquarters where they could talk. Meyer stated he would "be glad to come downtown." The two men then went to Barber's office where they talked for an hour or more. Barber testified he talked to Meyer as a fellow law enforcement officer since Meyer told him about being a deputy marshal in the sixth-class city of Plantation. During the course of the interview, Meyer stated he had been in the parking lot the night Wright disappeared since he was on duty and was keeping a certain car under surveillance whose occupants were suspected in recent acts of vandalism in the area.

The Jefferson County and Louisville Police Departments continued their investigation into Wright's death. During the trial of the appellants, the testimony of the detectives assigned to the investigation indicated the police had at least six or seven specific suspects. On the morning of November 12, 1966, Meyer called Detective Barber and informed him of an anonymous phone call he received threatening to tell the police that Meyer had been seen by them talking to Wright in the parking lot and demanding that Meyer pay $150. Barber then asked if he would care to come to police headquarters and discuss the matter. Meyer replied he would and showed up at Detective Barber's office at approximately 9:30 a.m. While Barber and Meyer were discussing the contents of the phone call, Meyer's employer called and informed the detectives Meyer kept a small caliber pistol in his car. Meyer was then advised of the information, and he admitted he carried a .22-caliber pistol in the glove compartment of his car.

The detectives then asked Meyer for permission to search his car. Earlier Meyer had mentioned that Wright had sat in his car during their conversation at the parking lot as it was raining at the time. Therefore, the detectives wished to search Meyer's car to look for the pistol in the glove compartment and because Wright had been in Meyer's car immediately prior to his disappearance. Meyer was advised of his constitutional right to refuse the search in the absence of a search warrant. Nevertheless, Meyer signed a waiver permitting the detectives to conduct the search.

A routine search of Meyer's automobile was made in the parking lot of the county police headquarters. A short time later, a more detailed search was conducted at the Jefferson County garage. No positive clues were found in either of the searches with the exception of some spots or stains that were found on the right side of the front seat. Meyer was asked what the spots were, and he explained he had spilled a cup of coffee on the seat.

The search of Meyer's automobile was completed at approximately 4 p.m., at which time Sgt. Mitchell requested Meyer to take a lie detector test in Frankfort. After some discussion he agreed. Arrangements were made with the Kentucky State Police in Frankfort to give the lie detector test that same evening. Meyer was asked to drive his own car to Frankfort with two of the detectives riding with him. Two other detectives drove a county car.

Sgt. Mahoney of the Kentucky State Police was assigned to conduct the lie detector test. After obtaining from Meyer his name, address, age, and occupation, but prior to the actual start of the test itself,

Sgt. Mahoney read the following to Meyer:

> "You have a right to remain silent. Do you understand this? Anything you tell me will be used against you in a court of law. Do you understand this? You have a right to an attorney, present or appointed, or to voluntarily agree to waive these rights and to take this polygraph examination."

Meyer then refused to take the test, explaining he didn't wish to waive any of his rights before talking to an attorney.

There is a conflict in the record as to whether or not Meyer was afforded an opportunity to contact an attorney after he refused to take the lie detector test. The detective testified Meyer was offered the use of a direct state telephone line to Louisville, but he declined their offer stating he preferred to wait until his return to Louisville. Meyer contends he was never offered the use of the direct line, nor was he allowed to make a call on a private line.

As Meyer and the detectives were leaving Frankfort, the detectives asked Meyer if he would mind stopping at the Kentucky State Police Post on the outskirts of Frankfort. Meyer freely consented. The purpose of the stop was to allow the state chemist in the crime laboratory to test the stains on the car seat and a stain on a bank deposit slip found in the glove compartment. After completing his tests, the technician informed Detective Barber he had found traces of blood. Detective Barber then entered the room where Meyer and Sgt. Mitchell were talking and informed them of the results of the tests. Sgt. Mitchell described what occurred thusly:

"As the technician went into the laboratory, I walked in the laboratory myself and looked around in the laboratory. It was my first experience there. August Meyer had come in and I walked around to the various rooms with him. And then, August Meyer and I were by ourselves in this one particular room. And I asked him if he cared to sit down and he sat down.

"And momentarily later, Sgt. Barber came into that room and said, 'That's blood in the car.' And August Meyer says, 'Well, I might as well admit it,' he says, 'I killed Ralph Wright. I shot him twice with my .22 [later clarified to 25] Colt automatic, while he was in my car.' But, he said, 'You all were wrong to think it was one man.' He said, 'There was another man with me, J. R. Mathis.'"

Meyer was immediately placed under arrest and advised of his constitutional rights. At approximately 10:15 p.m., the group left Frankfort on their return trip to Louisville. During the drive back to Louisville, Meyer freely and voluntarily told Detectives Barber and Pace the details of Wright's death and how he had taken the weapon apart and thrown the parts away at different locations. Meyer directed the detectives to these locations and directed them where to look for the parts. Next he took the detectives to the paint store where he worked and showed the detectives where he had hidden a box of .25-caliber shells.

Finally, between 11:30 p.m. and midnight, Meyer returned to police headquarters where the detectives sought to reduce the oral statements of Meyer to writing. Meyer was allowed to call his wife, and he asked her to call Frank Haddad, Jr., and to retain

him as his attorney. A short time later, Haddad called the detectives and told them he had been employed by Meyer and requested that no statement be taken from Meyer. Haddad also spoke to Meyer and advised him to make no statement.

As a result of Meyer's oral statement, the police immediately began a search for Julius R. Mathis. On November 14, 1966, Mathis surrendered to police in Birmingham, Alabama. He was taken before a magistrate and advised of his rights to remain silent. He refused to give any statement. He waived extradition to Kentucky and was released into the custody of the Jefferson County police officers. On the way back to Kentucky, near Decatur, Alabama, Mathis announced to the officers that there was something he would like to talk about. When asked whether it was concerning the Wright case, he said it was. The officers again advised him of his constitutional rights under *Miranda*, and they reminded him that the Alabama judge had admonished him not to talk about the case on the trip to Louisville. Mathis stated that he had talked to a Catholic priest, had gone to confession, and had received forgiveness; that he had talked to his wife and wanted to "get it off" his chest. He then confessed.

The Fifth Amendment to the Constitution of the United States guarantees, among other things, that no person "shall be compelled to be a witness against himself." The word "compelled" contemplates the use of "sweating" or other means of coercing a citizen to incriminate himself. Nowhere in any constitution, either Federal or state, is a requirement that officers charged with the investigation of a crime must enlighten the suspect of his right against self-incrimination. But *Miranda* does just that, and until it is over-

ruled we must try to live with it. So let us see what *Miranda* says at page 444:

> "* * * [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Meyer had not at the time of his confession, or at the time he consented to the searching of his automobile, been "taken into custody or otherwise deprived of his freedom of action in any significant way." In fact, Meyer pretending he was sympathetic and cooperative with the officers, having been one himself, did freely and voluntarily cooperate with them in practically every instance until he was wired to the polygraph lie detector in Frankfort, Kentucky. His change of mind and declination to take the test was promptly and without "whine or whimper" respected by the officers. He then reverted to his bold, audacious pretense of cooperation by consenting to have a test of the spots on the seat of his automobile. When he was advised of the results of this test, he promptly voluntarily and knowingly "spilled the beans" and confessed to his heinous crime.

We find no violation of *Miranda* here. He not only knew of his constitutional right against self-incrimination, but the operator of the polygraph read the *Miranda* "procedural safeguards" to him before his

confession. His confession was admissible. See Jewell v. Commonwealth, Ky., 424 S.W. 2d (1968); Hamilton v. Commonwealth, Ky., 401 S.W. 2d 80 (1966) cert. denied 385 U.S. 1014; and Chancellor v. Commonwealth, Ky., 438 S.W. 2d 783 (1969).

The denial of separate trial says appellant Meyer was prejudicial to him by reason of the admission of Mathis' confession. Bruton v. United States, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), is cited.

Some of the "ground has been cut from under" Bruton by Harrington v. California, 395 U.S. 252, 23 L.Ed. 284, 89 S.Ct. 1729 (1969), where the court found the evidence apart from that of codefendants was so overwhelming it was "harmless error" beyond a reasonable doubt to refer to confessions of codefendants.

In the instant case, as we have hereinbefore found, Meyer voluntarily and knowingly confessed the crime. Parts of the murder weapon were found at two separate spots to which Meyer led the officers. He also escorted the officers to the paint store where he worked and pointed out a box of cartridges from which he admitted he took the killing ammunition. Human blood was found in his automobile. His automobile, or one like it, was parked in the area of the swim club when deceased left work the night he was first missed by his family. Pictures were taken of appellant pointing out the box of cartridges. A small gun was observed in the desk a few days prior to the killing. He had test-fired the gun in a back room of the store in which he worked.

All this direct evidence (not circumstantial) made available by the acts of the appellant points so unerringly to his guilt that we think beyond a reasonable doubt that there was no prejudice to Meyer from the

admission of Mathis' confession. It follows that the trial court did not err in refusing to order separate trials. Braden v. Commonwealth, Ky., 407 S.W. 2d 124 (1966), and U. S. v. Mancusi, 404 F. 2d 297 (1968).

Meyer's fourth point is that the reference in the testimony to his decision not to take a lie detector test was prejudicial. True, we said in Penn v. Commonwealth, Ky., 417 S.W. 2d 258, that "an offer to take such a test [or refusal] has no evidentiary significance whatever." This reference to Meyer's refusal to take a lie detector test was improper. However, the evidence of guilt was so overwhelming and conclusive from the logic and voluntariness of his confession, including his disclosure of the place where he disposed of the murder weapon (parts of the same at different locations) and the finding of the weapon promptly after Meyer led the officers to the place, that reference to his refusal to take a lie detector test was harmless.

Meyer next cites six instances of what he terms improper and prejudicial argument by the attorney prosecuting the case. First, he claims that a reference in the Commonwealth's closing argument to the lie detector test was improper. As we have just indicated, this was improper argument but was not prejudicial.

Secondly, he complains of the argument referring to his failure to testify in his own defense. There was no specific reference in the argument to his failure to testify. The argument was that certain evidence was not contradicted by "any witness." There was no concentrated effort to persist in this argument. Taken alone, we find nothing prejudicial here.

The third complaint of the argument relates to the argument to the jury that "Thou shalt not kill." Counsel for Meyer, arguing previous to the closing argu-

ment for the Commonwealth, placed great emphasis on cruelty and immorality of the death penalty allowed under our law. The reference to one of the Ten Commandments was neither improper nor prejudicial. It was fair argument in rebuttal to Meyer's argument.

Objection is made to the following argument of the Commonwealth: "It's now up to you. This heavy burden is going off of my shoulders. I haven't slept for the last three nights. It's yours now. What are you going to tell the decent people of this community? In all that's right and fair and just, go to your jury room and, by your verdict, tell the people of this community that what we have heard the last three days will not be tolerated, will not be permitted in this community. I plead with you, do your duty and do it promptly. It it not pleasant, but do it. And may God, in His infinite wisdom, be with you in your deliberations. Thank you." The tenor of this argument is that the jury may have to "tell the decent people of the community" of its verdict. Also that the jury should "tell the people of this community" that crimes like the one in question "will not be tolerated, will not be permitted in this community." We do not condone this argument, but it falls short of tending to cajole or to coerce the jury, found to be reversible error in Jackson v. Commonwealth, 301 Ky. 562, 192 S.W. 2d 480, and Stasel v. Commonwealth, Ky., 278 S.W. 2d 727.

Meyer cites other instances in the closing argument of the Commonwealth's attorney, such as (1) a reference to the mental capacity of Meyer, with the statement that had there been anything wrong with the "mind of the defendant" the court would have given such an instruction, and (2) a reference to the fact that the Commonwealth was ordered by the court to "open his

file" to defendant Meyer, while the defendant Meyer was not required to do likewise, further characterizing the procedure as a "one-way street." Here again are unnecessary and "below the belt" arguments, but we are unable to conclude that they were prejudicial. Were it not for the high intelligence and fair mindedness of modern-day juries, we might reach a different conclusion. Society is indeed fortunate in having juries that are able to separate fair from unfair practice and to disregard those unfair arguments that some of our over-zealous prosecutors continue and persist in making.

Meyer's sixth ground for reversal assails his written consent to the search of his automobile. His written waiver begins with this statement:

> "I, August Robert Meyer, having been informed of my constitutional rights, not to have a search made of the premises [car] hereinafter mentioned without a search warrant, and of my right to refuse to consent to such a search, hereby authorize Jefferson County police officers * * * to conduct a complete search of my 1959 Cadillac and/or automobile * * *."

He freely, knowingly, and voluntarily consented to the search. Furthermore, there was no incriminating evidence produced by this search. The "real McCoy" was found by the search of the spots in the car while at the state police laboratory in Frankfort, and there is no denial by Meyer that he was given every *Miranda* warning at Frankfort. We find no merit in this argument.

Meyer next says he was prejudiced by the introduction of photographs of the deceased taken when lying face down in the woods and other photographs showing the bullet holes in his body. We have examined those

photographs and fail to detect anything "gruesome" or "inflammatory" in any of them.

Appellant Meyer's eighth argument is recapitulation of previous arguments relative to evidence of his "cooperation" with the police. We feel we have answered this argument previously.

Error is claimed by the failure of the trial court to instruct the jury on the voluntariness of Meyer's confession. We have set out in detail the events leading up to Meyer's confession. He does not deny any of this. The voluntariness of his confession was not in issue. Therefore, Bradley v. Commonwealth, Ky., 439 S.W. 2d 61 (1969), has no application.

Finally, and that word is a pleasure to write, Meyer says the trial court committed prejudicial error in overruling his pre-trial motion for change of venue, also that the publicity during the trial created an atmosphere in which it was impossible for him to receive a fair trial.

In addition to the filing of copies of newspapers containing articles about the case, four attorneys made affidavits in support of the motion for change of venue. They did not purport to know the state of public opinion and sentiment of the community. They were largely "conclusory." The showing for change of venue was not so strong and conclusive as to require granting change. See Stone v. Commonwealth, Ky., 418 S.W. 2d 646 (1967), cert. denied 390 U.S. 1010.

Three witnesses stated they "were acquainted with the public opinion" and Meyer could receive a fair trial. Furthermore, the newspaper articles contained no criticism or vilification of him or of any other person connected with the case. We find no abuse of discretion here. Tarrance v. Commonwealth, Ky., 265 S.W.

2d 40 (1954), cert. denied 348 U.S. 899. Neither do we find any prejudicial reporting of the trial during the course of same or thereafter. See Wolfe v. Commonwealth, Ky., 431 S.W. 2d 859 (1968).

MATHIS' APPEAL

Next we consider questions raised by Mathis' appeal. He raised the following five questions: (1) He questions the admission of Meyer's confession into evidence: (2) he claims he was erroneously denied a separate trial; (3) "the practice of trying defendants together when they have made statements implicating themselves and their co-defendants denies the accused of the right of fair play as advocated by Giles v. Maryland," 386 U.S. 66 (1967); (4) here again, he questions his confession on the ground he had no attorney present; and (5) his final question is that his own confession was coerced, that it was produced by his "in custody" interrogation and without counsel.

We find Meyer's confession was inadmissible against Mathis, but it was not prejudicial to Mathis for the simple reason that Mathis' confession was identical to that of Meyer, except in an unimportant detail, if at all, and that was that in Meyer's confession he said Mathis struck deceased in the head with a "timing chain" four or five times after he was shot, while Mathis said that after he heard two shots fired into the body of the deceased man, he, Mathis, "blacked out." Additionally, the trial court admonished the jury not to consider Meyer's confession against Mathis.

Mathis cites Bruton v. United States, supra, in support of his contention that Meyer's statement was prejudicial to him to the extent that he should have been given a separate trial. The appellee counters

with the argument that the facts in the present case take it out of the *Bruton* rule, and we agree. United States ex rel. Catanzaro v. Mancusi, 404 F. 2d 296 (1968). The court said in Mancusi:

> "Where the jury has heard not only a codefendant's confession but the defendant's own confession, no such devastating risk attends the lack of confrontation as was thought to be involved in Bruton."

See also Braden v. Commonwealth, Ky., 407 S.W. 2d 124 (1966).

The answer to Mathis' first argument provides a complete answer to his second question as to separate trials.

Mathis' third point is a distillation of his argument for a separate trial. This point is answered in our discussion of his first argument.

Mathis' fourth point concerns the validity of his confession. He says he was interrogated by the officers after his arrest in Alabama; that he had no attorney; that when he confessed, he was under a "coersive atmosphere of an incommunicade custody situation" (sic). The evidence is clear however that the Alabama judge not only gave Mathis every *Miranda* warning. but cautioned Mathis not to discuss the case on the way to Louisville. The three officers who returned to Kentucky with Mathis gave a convincing account of the voluntariness of his confession. Of course he had no counsel present. But the fact that one suspected of a crime has no attorney present should not prevent him from confessing his crime if he does so voluntarily, knowing that his confession may be used against him. The important question is did the officers continue

to question him after his arrest and after he was warned and advised of his constitutional rights? The three officers say not. The trial court agreed, as did the jury. We do not disagree.

The last argument presented by Mathis is that his own confession was improperly admitted in violation of the rule in Miranda v. Arizona, supra.'

From what we have said both in the statement of facts and in our discussion of Mathis' confession elsewhere in this opinion, we have no difficulty in concluding that his confession was voluntary and entirely proper under *Miranda*. See also Chancellor v. Commonwealth, supra.

It should be noted that it has been deemed by the court necessary to discuss all questions raised by the two appellants as they appeal from the entire judgment. The case of Fryrear v. Commonwealth, Ky., ___ S.W. 2d ___ (decided July 2, 1971), is unlike the instant case in that in *Fryrear* the appeal was only from that part of the judgment sentencing him to a death penalty.

The judgment as to Meyer is reversed for a new trial on the question of the penalty only. The judgment as to Mathis is affirmed.

All concur.

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